



STATE OF DELAWARE
DEPARTMENT OF CORRECTION
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August 13, 2012

The Honorable Joseph R. Biden, III
Attorney General of Delaware
Delaware Department of Justice
820 North French Street
Wilmington, Delaware 19801

Dear Attorney General Biden:

Over the past few weeks, at my direction, the Department of Correction has been conducting a review of the Day Labor Program operating from the Sussex Community Corrections Center (hereinafter SCCC). The review is now complete, and I am writing to share the Department's findings and respond to certain questions raised about the operation of this program.

The Day Labor Program serves an important purpose in providing offenders eligible for work release an opportunity to participate in gainful employment while completing their sentences. The Day Labor Program administered by SCCC provides intermittent employment to a small number of offenders who do not otherwise have jobs. While the program was mutually beneficial for both the offenders who volunteered to participate and the employers who occasionally used it, the small size and irregular use of the program contributed to a lack of defined procedures and certain inconsistent practices. Specifically, the program lacked a system for historical tracking of offender participation, it suffered from inconsistent collection of fines, restitution, and other charges, and it had a history of underutilization due to a lack of broader knowledge of the program. In the Department's review, we uncovered no evidence that these facts were the result of purposeful misconduct by or on behalf of employees of the Department of Correction. Rather, they are the result of inconsistent utilization of the program and the failure to adopt written policies governing subjects like document preservation.

Before detailing the Department's findings and recommendations, some background information may be helpful in understanding the role the Day Labor Program plays in the larger system of work programs.

An Overview of Work Release. The Department of Correction operates five SENTAC level 4 work release facilities. The primary mission of these facilities is to facilitate the reintegration of work release eligible offenders back into our communities.¹ Work release-eligible offenders are those with a SENTAC level 4 sentence, or are within six months of completing an appropriate level 5 sentence. While programs such as substance abuse treatment and anger management are provided, significant emphasis is placed on assisting offenders in getting ready to work, and obtaining and holding legal employment. Consistent with long-standing state policy, the Department believes work plays an important role in helping offenders become self sufficient and that instilling values associated with hard work and self respect are important in the process of becoming law abiding citizens. Delaware law specifically contemplates and provides for work release. See generally 11 Del. C. § 6533. The law encourages inmates to work while still under the supervision of the Department to help defray the costs of incarceration and to pay costs, fines and restitution related to their conviction. 11 Del. C. §§ 6532(f), 6533(e), 29 Del. C. § 8913(a). The Department is given latitude, within the confines of state law, to determine when and how such costs are collected. 29 Del. C. § 8913(b), 11 Del. C. § 6533(a). The Department supports the mission of these level 4 facilities by engaging with the Department of Labor and other resources to help these level 4, work release-eligible offenders get ready to work and to find a job. Offenders may participate in one or more of four separate programs.

First, offenders who are able to obtain full time or consistent part-time employment are part of the traditional Work Release Program. Offenders in work release are responsible for getting themselves to work and are paid directly by their employers. Statewide last year, more than 1,000 offenders worked at full or stable part-time employment through the Work Release Program. There were almost 500 offenders going to work from SCCC alone. On a daily basis, hundreds of offenders depart Department work release facilities for work each workday.

Second, offenders who are unable to find employment are required to participate in our Community Service Program. In the Community Service Program, offenders provide manual labor cleaning our roads, maintaining cemeteries and performing other acts of community service under the supervision and direction of the Department of Correction. The offenders are not paid for their labor,

¹ Importantly, the Sentencing Accountability Commission ("SENTAC") was established by the General Assembly in 1984 with broad representation from the Judiciary and other criminal justice agencies to establish sentencing guidelines for the State of Delaware. 11 Del. C. Chapter 65. In so doing, the General Assembly specifically required SENTAC to formulate sentencing guidelines, with work programs as part of the mix of sanctions. 11 Del. C. § 6581(c)(1). As a result, SENTAC established sentencing guidelines that encourage work programs and the Department of Correction has followed these guidelines by administering such programs throughout the Department.

but may receive credit for hours worked applied to any court ordered community service requirements. Last year, offenders under the supervision of Correctional Officers performed 219,107 hours of community service. Offenders from SCCC performed 155,864 hours of community service.

Third, offenders unable to find full time employment are also eligible to volunteer for Special Projects, which are community service projects performed under the direction and supervision of a private non-profit organization such as little leagues and volunteer fire companies. These offenders are also not paid for their labor. Instead these offenders may apply to credit the hours worked against court imposed community service, and court costs and fines. Historical usage of the program is limited because only private non-profits are allowed to use the program. While this is a small program, testimonials from employers demonstrate its value to our little leagues and volunteer fire companies.

Fourth, offenders at SCCC who are otherwise not employed may volunteer for the Day Labor Program. This program allows offenders to volunteer to work for private businesses on an as-needed basis. The Day Labor Program is very similar to traditional work release programs in many respects. The primary difference is the duration and sporadic nature of the employment relationship. Because offenders do not have a long-term employment relationship with the employers, use of the program is more sporadic. Offenders in the Day Labor Program are paid directly by the private employer in the same manner that offenders in traditional work release are paid. Our review did not uncover instances in which offenders reported being unpaid or paid less than minimum wage.

The Day Labor program is, by far, the smallest of the four work programs. Through our review of the limited available records and the historical record the Department has been able to determine from its review, I believe that the Day Labor Program was used only intermittently, typically by a few offenders on fewer than 50 days a year. Comparing the two programs and providing some context, there are more offender work hours accrued *in a single day* of the traditional Work Release Program than there are *in a year* of the Day Labor Program. Nevertheless, the Day Labor Program promotes working and is a part of the variety of work programs available supporting the overall mission.

For offenders with paying employment on work release, "it is the policy of the Department of Correction to collect monies from offenders to satisfy judicial and Department imposed financial obligations." DOC policy manual policy 8.26 found on-line at http://www.doc.delaware.gov/pdfs/policies/policy_8-26.pdf. Offenders on work release with full time employment are assessed \$25.00 a week for court costs, fines and restitution (costs), and another \$25.00 for the costs of incarceration (room and board). SCCC policy statement found on-line at http://www.doc.delaware.gov/BOCC/BOCC_CCC_sussex.shtml#SWRC. Lesser amounts are assessed against offenders working less than full time. Each week, a list of offenders is posted with the assessments noted. Offenders who fail to pay the assessments are subject to sanctions including having

work privileges revoked. All payments of costs are forwarded to the courts for disposition. Payments received for room and board are deposited into the State's General Fund.

Offenders on work release maintain the same personal banking services they had prior to supervision of the Department. Unlike level 5 inmates, many offenders on work release are sentenced to weekends, or for short periods of incarceration.² They may have full time employment with direct deposit, and bills which are automatically deducted from those accounts. Forcing these offenders to use Department established accounts would be administratively difficult, confusing and contrary to the mission of successful reintegration. While within Department facilities, they are permitted to keep less than \$100.00 on their person to allow them to pay for necessary living expenses, such as commuting expenses and food.

The Day Labor Program at SCCC. The Day Labor Program has been in existence at least since the early 1980s, under the old parole system of sentencing and prior to the creation of SENTAC. The program was established at the Sussex Correctional Institution ("SCI") prior to the construction of the Sussex Work Release Center, which was completed in 1989. It was created, in part, to address the agricultural needs of the community surrounding SCI. It has never been expanded statewide. Under this program, local employers, usually farmers, could obtain inmate labor by contacting SCI and making a request. If approved, a memo was sent to the shift commander authorizing the release of a specified inmate to a named employer. The purpose of creating a memo was to notify the shift commander of the action and to ensure the inmate would be permitted to leave the facility, to ensure inmate accountability and to allow the facility to maintain an accurate institutional count. The employer was responsible for picking up the inmate at the institution, supervising the work performed, paying the offender and returning them to the institution. As with anyone entering or leaving Delaware's correctional facilities, the inmate's departure from the institution would be noted in the daily log along with the time of departure, and the time the inmate was readmitted to the facility. The above-mentioned memo was maintained with the log book as part of the official inmate count until the inmate was returned. Once the inmate was returned, the memo was discarded because it no longer served the purposes for which it was created. Staff no longer needed to know of a pending release, no longer needed to know where the inmate was, and the institutional count no longer needed to be reconciled.

When the Sussex Work Release Center (which is now part of SCCC) was completed in 1989, the program was transferred to and became part of the Center's operations as the Day Labor Program. It was discontinued at SCI. Most practices of the Program apparently continued unchanged from the practices previously used at SCI.

² The Department maintains inmate accounts for all level 5 inmates not on work release in accordance with 11 Del.C. § 6532(f). Of course, those inmates generally do not usually have outside income and so the accounts are for the limited purpose of incidentals and other expenses during incarceration.

Since the program has been operated at SCCC, it has generally operated in response to calls received by the Work Program Coordinator. Employers would contact the Work Program Coordinator and make requests to use offenders for limited work project assignments. If the request was approved, the offenders in the facility were asked if any of them wanted to perform the work and if any of them had experience with the particular work to be performed. The Work Program Coordinator would then select an offender or offenders from those eligible and willing to work, and those persons would be assigned to the job. A memo was then generated by the Work Program Coordinator to the Duty Officer advising them of the work plan. As at SCI, the employer was responsible for picking up the offender, supervising the work performed, paying the offender and returning him to the institution. Once the offender was returned, the memo was discarded as no longer necessary for maintaining an accurate offender count or to inform staff of an offender's whereabouts. In short, this legacy program was never infused with the more modern-day policies, procedures and accountability mechanisms that accompany the programs run by the Department after the creation of SENTAC. That was a mistake.

Offenders were considered eligible for the program if they met statutory and regulatory limitations on participation in work release. 11 Del. C. § 6533. Only level 4 offenders and level 5 offenders who are within 6 months of completing their sentence can participate. 11 Del. C. § 6533. Section 6533 of Title 11 further limits who can participate in work release programs. 11 Del. C. § 6533(d), (f). In addition, the Department has used its regulatory authority to clarify the legal limitations and further restrict access to work release by sex offenders.

Recent Events and Our Review. On February 20, 2012, two offenders working in the Day Labor Program burned tractor tires on a farm owned by Allan Baker. An altercation apparently ensued involving Mr. Baker, Representative John Atkins (the owner's son in law), and two neighbors. Neither of the offenders was involved in the altercation. Police responded. The owner of the farm admitted to ordering the tires burned and subsequently paid a fine to DNREC for the conduct. The neighbors were charged as a result of the altercation. The story attracted the attention of local media. The News Journal followed up with a FOIA request to the Department of Correction seeking documents related to historic use of the Day Labor Program. In attempting to respond to the FOIA request, I first became aware that this program did not preserve documentation identifying offender participants and where offenders have been assigned. On June 13, 2012, I ordered the program suspended pending an internal review.

I appointed Alan Grinstead, Deputy Chief of the Bureau of Community Correction, and Curt Shockley, Director of the Division of Probation and Parole, to conduct the review under the supervision of Karl Hines, Chief of the Bureau of Community Correction. During the course of their review, they and individuals working at their direction interviewed offenders, Department of Correction personnel, and employers known to have used the Day Labor Program. Additionally, by comparing multiple

source documents they attempted to determine the historical usage of the Day Labor Program.³ Twelve current and retired employees of the Department were interviewed, along with five employers who have used it in the past. In addition, they identified and interviewed ten former participants in the Day Labor Program, including offenders who were both still incarcerated and those who have since been released. In total, over 500 staff hours were invested in this investigation.

It should be noted that all of the offenders and employers interviewed expressed support for the program and requested it be reinstated. Offenders supported the program because they had been unable to obtain full time employment and had no other means of support. The program gave them the opportunity to earn some money, make some contacts in the community and hopefully earn full time employment upon release from custody. Employers stated that they supported the program because they saw the value it had for the offenders, and gave the employers a source of labor to assist them in operations when they did not have sufficient work to justify hiring a full time employee.

In addition to their general review of the Day Labor Program's operations, I asked the reviewers to focus on concerns that have been raised about the program's documentation, financial operations, and utilization. The Department's principal findings on those subjects are as follows:

1. The failure to preserve records relating to how employers utilized offenders was an administrative failure and not an attempt to avoid preserving documents subject to FOIA.

As indicated above, I suspended the Day Labor Program out of concern that the program's failure to preserve records showing its utilization reflected a lack of appropriate policies and procedures for tracking offenders. Since that time, I have been asked if the failure to preserve records was a purposeful attempt to avoid public disclosure of those records.

The Department concludes that the failure to preserve documents was an administrative failing that extends back to the historical initiation of the program at SCI. The purpose of creating a memo identifying the employer and the inmate sent out to work was to notify the shift commander of the action and to ensure the inmate would be permitted to leave the facility, to ensure inmate accountability and to allow the facility to maintain an accurate institutional count. The document was discarded upon the inmate's return to custody because it no longer served any of those purposes.

The original process appears to have been adopted without change when the program moved to SCCC. Again, the purpose of the memo was viewed by the facility as notifying the Shift Commander of the fact and purpose of the offender leaving the facility, to provide a record of where the offender was working in the event a problem arose while the offender was at work and to reconcile the institutional

³ The resulting document is attached as attachment 1. The document does not include statistics for utilization of the program in 2010. Our review of the available records did not uncover evidence that the program was used during that year.

count process. Once the offender was returned to the facility, the memo was discarded as no longer serving any purpose.

The failure to preserve these records did not impact the ordinary day-to-day operation of SCCC. SCCC knew at all times which employer had hired the offender, their location, and contact information – the same details that SCCC knows about all the Work Release Program participants.

However, what SCCC did not know was the historical details about where each offender worked and on what day. This may have been important in the event the Department had to re-create the records to determine which offender worked a particular duty assignment. But because that never became necessary, the forms were not generally preserved.

This is unlike the preservation of records on offenders working on a full time basis. The difference is that in the traditional Work Release Program, the offender visits the same employer each day, and such information is tracked in an electronic database. In contrast, the Day Labor Program work was intermittent and varied, and the database was not created to handle preservation of such varied information.

The failure to retain these documents is the product of a little known and scarcely utilized program created over 25 years ago, when policies and procedures at the Department were more casual and less automated. The Department has found no evidence that these documents were discarded to evade subjecting them to FOIA. Rather, the forms were discarded because they were believed to have no further use and because that is how the program had been handled for 25 years. Unfortunately, one consequence of discarding these forms is the Department does not have a complete set of available records demonstrating the whereabouts of each Day Labor Program participant on any particular day in the past.

Corrective Action:

DACS, the Department's Automated Correctional System, was designed to track offenders who leave the facility seeking work or who are working full time. It was not designed to track the offenders who are employed on a short term or daily basis. We are exploring the feasibility of correcting this shortcoming through an update to DACS.

In the meantime, the Department will promulgate new policies governing the Day Labor Program that will require manual tracking of participants in this program, and require that the records be retained for historical purposes. Those requirements will be part of the new policies governing the Day Labor Program.

The new policies governing the Day Labor Program are attached hereto as Exhibit A. As you can see, the Day Labor Program will now be known as the Short Term Labor Program, a term that I hope will reduce the confusion over the function and purpose of this program as it relates to other work release programs. The policies for the Short Term Labor Program will specify the limitations on this program, clarify the program's availability to interested employers, and provide appropriate recordkeeping. The policies will define the responsibilities of any employer wishing to participate. The employer will be required to pay the offender with a business check, thereby creating a record of the transaction. A copy of the check will be retained by the Department for historical purposes. Further, the employers will be placed on notice of our expectation that any participating employer will comply with all state and local laws relevant to the operation of the program.

2. The Department collects costs, fees and room and board from offenders in work release who have paying jobs; however, the collection of these assessments from offenders in the Day Labor Program is inconsistent.

The Department has an established practice of assessing costs and room and board against offenders in the traditional work release program. Offenders who are employed full time and steady part time are consistently assessed these fees.⁴ In addition, each facility has a track record of sanctioning offenders who fail to pay the assessments. Non-compliant offenders are reviewed by the institutional Multi-Disciplinary Team (MDT), which has the authority to impose sanctions. The most common sanction is to move an offender back to an earlier phase of the program, which results in the loss of the privilege of leaving the facility for work.

However, the Department concludes that the assessment and collection of these fees from offenders in the Day Labor Program is not as consistent as it was in the traditional work release program. Fees from offenders working only intermittently in the Day Labor Program do not appear to have been collected with the same regularity as offenders who are working full time or regularly in part time positions. Additionally, a work program coordinator retired about 18 months ago, and subsequently, collections stopped.

The departure of the member of the staff that handled the Day Labor Program explains the recent failure to collect assessments and highlights the need for policies which clearly delineate responsibilities for staff, so activities are not so dependent on the experience of the assigned staff member. However, this does not explain what appears to be an historical inconsistency in assessing and collecting fees extending back beyond the most recent 18-month period. There may well be ample reasons why a particular collection might not be made, such as the indigence of the offender. For example, all too

⁴ The fee assessed for part time workers varies. New Castle Community Correction's charges a flat \$15.00 fee for costs and a \$15.00 fee for room and board. Kent Community Corrections and Sussex Community Corrections assess \$5.00 a work day for each. The policies attached correct this inconsistency.

often offenders who are soon to be released back into the community are not working regularly, have no source of support, and have special needs such as a mental health condition. Under those and similar circumstances, it may be appropriate to allow the offender to retain the small amount earned through the Day Labor Program to meet basic needs, such as food, medical, and commuting costs, that help stabilize the offender in the community. Unfortunately, because no record was created detailing why these decisions were made, they cannot be evaluated. Thus, from the scant record available we cannot determine if the failure to collect was an affirmative decision or an oversight. A more formal mechanism, such as the Department uses for traditional work release participants, for assessing and collecting costs and room and board is necessary and will be part of the policies going forward.

Corrective Action:

The policies attached hereto address the need for financial accountability as well as of offenders. Offenders participating in the successor to the Day Labor Program will be assessed costs and room and board at a rate commensurate with the hours worked in relation to the assessment for full time employment. The assessment will be collected as it is with all work release offenders, unless good cause is shown for excusing collection. A determination that a collection from a particular offender is inappropriate under the circumstances must be approved by the warden of the facility and the cause documented.

- 3. When initiated, use of the Day Labor Program by area farmers was more wide-spread. In recent years, fewer employers have taken advantage of the program. There is no evidence of employees of the Department taking advantage of the Day Labor Program.**

Since the suspension of the Day Labor Program, I have heard allegations to the effect that the program was an exclusive "political perk" for elected officials or for employees of the Department. The Department has reviewed these allegations, and believes them to be unfounded. However, because the Day Labor Program is not publicized by the Department or widely-known in the business community, it does suffer from selective use by a small number of private firms.

The Department has spent considerable time and effort interviewing employers, offenders and staff associated with the Day Labor Program. Through these interviews, we have established anecdotal evidence about use of the program over the years. When it was initiated, the Day Labor Program was widely used, primarily by area farmers. The use of the program has declined over the years. We have identified six private businesses that have used the program during the last two years. Among them are Cypress Farms (operated by the son of former State Representative Charles West) and Allan Baker Farms (operated by the father-in-law of Representative John Atkins). Other employers using the program during the last two years include Representative John Atkins, Red Oak Paints and Bethany Bay. In addition, there was an isolated use of the program by a disabled couple who asked for special

assistance. We have found no evidence to suggest that other private businesses expressed interest in the program and were denied access or that there was otherwise an exclusive arrangement with these six private businesses. So while there clearly are a small number of businesses using the Day Labor Program, it has not been used exclusively by elected officials over the five years we were able to reconstruct reviewed.

A News Journal reporter has informed me that she has received a complaint of Department employees utilizing offenders to support their own lawn care service through the Day Labor Program. Names of five employees were provided to the Department who were alleged to have used offenders to cut grass on behalf of the employees. It was further alleged that the employees were compensated for the work performed, but the offenders were not. We reviewed these allegations but our review has not found any basis to this complaint.

Corrective Action:

To address concerns that the program may be selectively used, the program will be advertised on the Department's web site when it is reinstated. The Departmental Code of Conduct prohibits employees from associating with offenders and thereby prohibits them from using the program because of the conflict of interest. The Department views such associations as creating the possibility that employees could be manipulated into creating a security breach. In addition, it creates the potential that offenders could receive impermissible benefits for participating, or impermissible penalties for refusing to do so. The Department expressly prohibits employees from using their official position to gain "privileges or advantages for themselves..." DOC Policy 8.9 available on line at http://www.doc.delaware.gov/pdfs/policies/policy_8-9.pdf. Because this prohibition is important to both institutional security and Departmental credibility, it will be restated in these policies and Department employees will be reminded of the importance of avoiding such conflicts through a general email and news letter.

Conclusion:

The Day Labor Program was once a widely used program that has diminished significantly in use over the years. The reasons fewer employers are using the program are speculative – but the increased availability of offenders working through the Community Service Program has likely reduced the demand, some of our past employers are no longer in business, and the past reliance on word of mouth advertising is no longer effective. The resultant reduction in demand brings into question the continued viability of the program. Nevertheless, it is clear that some offenders have benefited from the program. Moreover, the program does serve an important mission of the Department, and the mission of the work release centers. I have decided to reinstate the program; however, such action must be predicated on implementing the corrective actions identified. Specifically, the Department of Correction

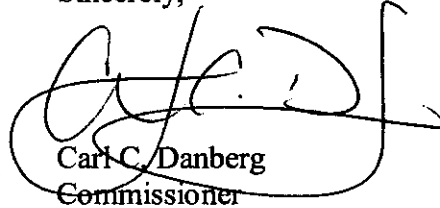
The Hon. Joseph R. Biden, III

August 13, 2012

Page 11

must have appropriate controls in place to monitor the use of the program, track the use of the program and reasonably ensure that the program is compliant with applicable laws. The Department's review is now concluded. We stand ready to cooperate with any request for information or action you deem appropriate.

Sincerely,



Carl C. Danberg
Commissioner

CC: The Hon. Jack A. Markell, Governor
The Hon. Bruce C. Ennis, Chair, Senate Adult and Juvenile Corrections Committee
The Hon. James Johnson, Chair, House Corrections Committee
The Hon. Greg Lavelle, Representative
The Hon. Debbie Hudson, Representative
Karl Hines, Chief, Bureau of Community Correction
Alan Grinstead, Deputy Chief, Bureau of Community Correction
Curt Shockley, Director, Division of Probation and Parole